COURT OF APPEALS DECISION DATED AND FILED

August 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-0368-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LORI L. EWALD,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

SNYDER, P.J. Lori L. Ewald appeals from judgments of conviction for two misdemeanor offenses: possession of THC contrary to § 961.41(3g)(e), STATS., and possession of drug paraphernalia contrary to § 961.573(1), STATS. The defense stipulated to the fact that the substance found in the vehicle was marijuana and to the chain of custody. The only issue remaining

was whether Ewald had *knowledge* that the marijuana was in the glove compartment of her vehicle. *See* WIS J I—CRIMINAL 6030.

Ewald now argues that the trial court misused its discretion when it allowed the testimony of the arresting officer that Jason Woods, whom Ewald and her boyfriend had just dropped off prior to the stop by police, frequently hitchhiked and was in the habit of "paying" for his rides with drugs. We conclude that because Ewald's counsel objected to this testimony on the basis of relevance, and not on the "habit" argument raised on appeal, this issue is waived. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). However, in the interest of judicial economy, we will assume arguendo that the testimony was erroneously admitted. We nevertheless conclude that it was harmless error. A review of the trial transcript convinces us that there was sufficient other evidence presented which permitted a reasonable jury to conclude that Ewald was aware of the THC in the glove compartment. We affirm the convictions.

At approximately 8:00 p.m. on December 18, 1996, Brian Annen, an investigator with the City of Burlington Police department, observed a vehicle in a downtown parking lot that was operating without headlights. Annen followed the car when it exited the parking lot and eventually pulled the vehicle over at a gas station. The vehicle was registered to Ewald, who was driving. In the front passenger seat was Ewald's boyfriend, Derrick Durkee. Annen requested identification from both occupants; Ewald provided a driver's license and Durkee gave the investigator a Wisconsin ID card. A status check revealed that Durkee had an outstanding arrest warrant and he was placed under arrest.

Ewald's car was then searched.[1] The search revealed a bag of marijuana and a chrome pipe. Both were inside the unlocked glove compartment of the car in front of the front passenger's seat. Annen testified that Ewald told him that she "did not know how the paraphernalia and the contraband got in there." She also said that the items did not belong to Durkee. Ewald was subsequently charged and convicted of misdemeanor possession of THC and drug paraphernalia. This appeal followed.

Ewald's appellate argument is that the trial court misused its discretion when it permitted "Investigator Annen's testimony as to Woods' 'habit'"—that of paying for rides with marijuana. She bases this argument on the following: that Annen's testimony was not given in the form of an opinion, that the basis for Annen's belief was never inquired into, and that the behavior does not qualify as a habit. However, counsel did not raise any of these objections at the time the testimony was challenged. Instead, the relevant portion of the trial transcript is as follows:

> [PROSECUTOR]: Was it quite common for [Jason Woods], based on your background and experience, to ask people for rides?
>
> [ANNEN]: Yes.
>
> [PROSECUTOR]: And to your knowledge, how would he pay, if anything, for his rides?
>
> [DEFENSE COUNSEL]: Your Honor, I'm going to object. This is irrelevant.

[1] Ewald refused to consent to the search of her car. However, after Durkee was arrested, a search was conducted incident to a lawful arrest.

[PROSECUTOR]:	I don't think it is, judge. We can have a meeting.
[THE COURT]:	The objection, I'm going to overrule it. The basis is relevancy you're objecting on? I think it's relevant. We've got enough on the record, based on the officer's testimony, to make it relevant. Overruled.

Annen then testified: "It's been my understanding in the past that he pays oftentimes with marijuana." Thus, the sole objection to the admission of this testimony was that it was irrelevant. The trial court responded to that objection by exercising its discretion in determining that the testimony was relevant.

Ewald now objects to the admission of the above testimony on an entirely different basis from that raised before the trial court. The rule is well settled that "[f]ailure to object to an error at trial generally precludes a defendant from raising the issue on appeal." ***State v. Davis,*** 199 Wis.2d 513, 517, 545 N.W.2d 244, 245 (Ct. App. 1996) (quoted source omitted); *see also* § 901.03(1), STATS. This rule applies to both evidentiary and constitutional errors. *See* ***Davis***, 199 Wis.2d at 517, 545 N.W.2d at 245. Because a contemporaneous objection "may lead to the exclusion of evidence and thereby contribute to finality in criminal litigation," it also encourages the parties to view the trial as an "event of significance" and keep it as error free as possible. *See* ***id.*** at 518, 545 N.W.2d at 246. We deem the issue waived.

However, in the interest of judicial economy, we consider the result had counsel lodged the habit objection. Assuming arguendo that the admission of the evidence after such an objection was improper, we consider the result of the admission. "[E]rrors committed at trial should not overturn the conviction unless it appears that the result might probably have been more favorable to the party

complaining had the error not occurred." ***State v. Sonnenberg,*** 117 Wis.2d 159, 179, 344 N.W.2d 95, 105 (1984). Even with an objection, an erroneous ruling would not mandate a reversal unless a "substantial right" of the defendant is affected. *See* ***id.*** at 179-80, 344 N.W.2d at 105.

According to Ewald, the State's theory of the case involved a showing that a third party provided Ewald with marijuana on the day she was stopped.[2] However, upon review of the trial transcript, we disagree that the State's case was so narrowly based. The State had the burden to prove *knowing* possession of the THC in the glove compartment, and Ewald's contention throughout the proceedings was that she had no idea that the contraband was there. In meeting its burden to prove the knowledge element, the State offered the following facts: the contraband was found in the glove compartment of a car owned and operated by Ewald, the officer's observance of Ewald's surreptitious driving just moments before the stop, Ewald's admitted familiarity with marijuana and drug paraphernalia, Ewald's refusal to allow a search of the car, her testimony that she had given a ride to Woods who was known to have past involvement with drugs, and the placement of the marijuana at the front of the glove compartment which was within her reach.[3]

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[2] The prosecutor's opening statement shows that while reference was made to Jason Woods as an individual who was "known to police officers," there was no mention of his occasional practice of paying for rides with marijuana.

[3] A review of the State's closing argument also supports our conclusion that the reference to Woods' "habit" was inconsequential. After reviewing the facts, the prosecutor said:

> The defendant is telling us she knew nothing about it. Mr. Durkee's telling us he knew nothing about it. It's the hear no evil, see no evil analysis. Even though it's my car, I knew nothing about it….

(continued)

Even disregarding the testimony that Woods had in the past paid for rides with drugs, there was sufficient evidence for a reasonable jury to conclude that Ewald's disclaimer that she did not know the contraband was there was less credible than the evidence of knowledge offered by the State. The prosecution spotlighted Ewald's actions *after* the stop as indicative of her knowledge that the contraband was in the car. In contrast to that, the question about Woods and his purported practice of paying for rides with drugs was a single question posed to one witness. In relation to all of the factual and circumstantial evidence offered, admission of that single piece of testimony, if in error, was harmless error. We conclude that even assuming error, there is no "reasonable possibility that the error

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> Circumstantially, you know the defendant is guilty by the evidence in this case.
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> [W]e know the defendant had control over the area where the marijuana and drug paraphernalia was found….
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> But the issue is; did she possess the marijuana, the defendant. She told us that she knows what marijuana looks like. She knows what drug paraphernalia looks like. The glove compartment was within easy reach…. And then when the officer said can I search your car? She said no, you can't search my car.
>
> Why would she say that? It's evidence of guilt….
>
> ….
>
> So I think when you look at all the facts, the facts being it's her car; she had total control over the entire car, driving through Burlington, being stationed on Mill Street at night with no lights on, and suddenly vectoring herself into the municipal parking lot without any lights on…. We know that we're approaching the longest night of the year and one would normally have their lights on, unless one is trying to run away or not be seen by police after some type of transaction may have occurred. *And we know from testimony that Mr. Jason Woods likes to pay off his debts with contraband.* [Emphasis added.]

The last sentence of the above is the single reference to the testimony regarding Woods' habit.

contributed to the conviction." ***State v. King,*** 205 Wis.2d 81, 94, 555 N.W.2d 189, 194 (Ct. App. 1996). Therefore, any error is harmless, *see* ***id.***, and we affirm the convictions.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.